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No. 87-343

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MONTANA, ET AL., APPELLANTS

v.

CROW TRIBE OF INDIANS, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO AFFIRM

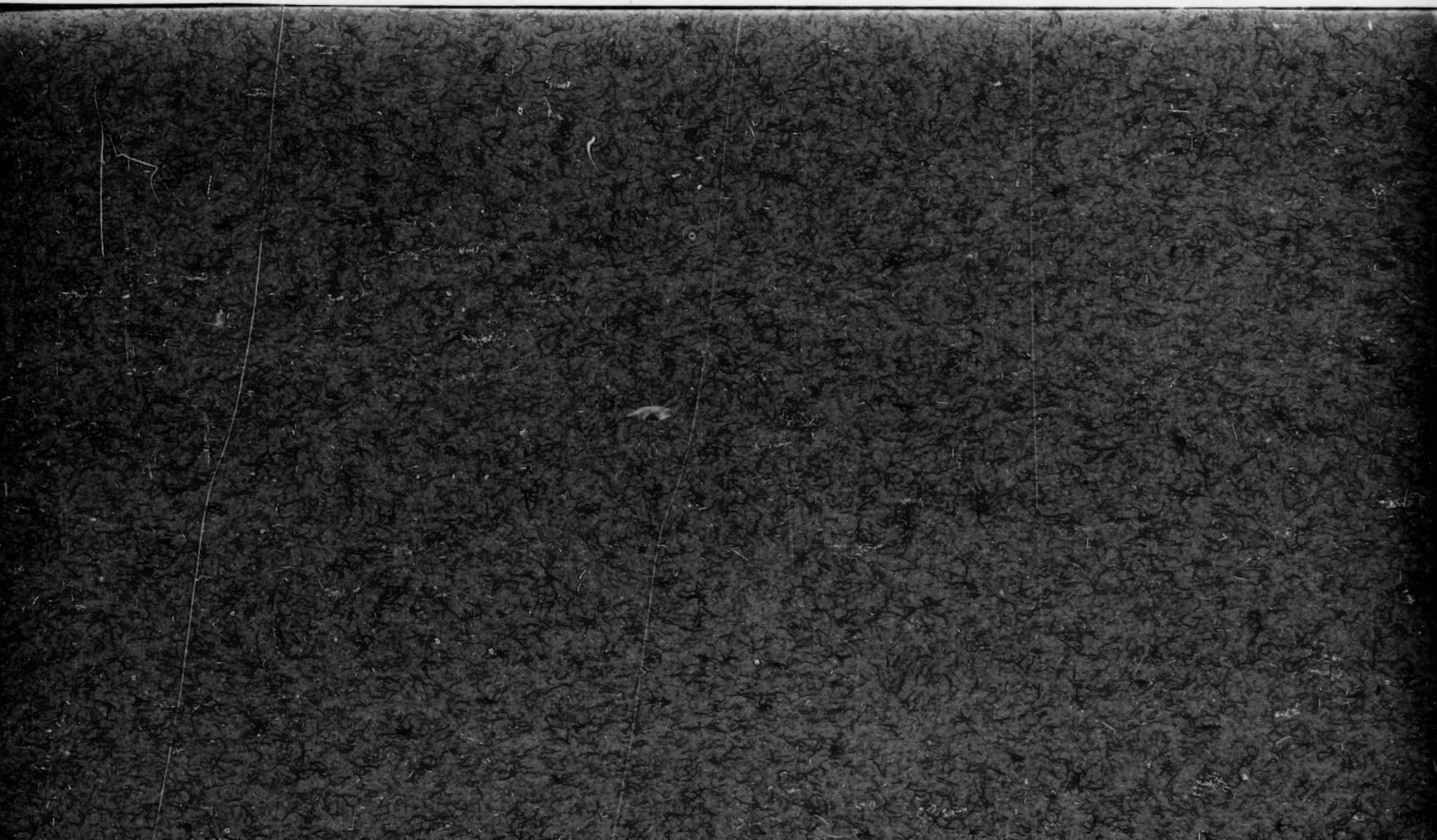
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QUESTION PRESENTED

Whether Montana's gross proceeds and coal severance taxes may be applied, at the same rates that apply to the mining of coal owned by non-Indians, to the mining of coal that was part of the original Crow Reservation and that continues to be held by the United States in trust for the Crow Tribe of Indians.

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MOTION TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves that the judgment of the United States Court of Appeals for the Ninth Circuit in this case be affirmed.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-21a) is reported at 819 F.2d 895. The opinion of the district court (J.S. App. 22a-74a) is reported at 657 F. Supp. 573. The opinion of the court of appeals on the prior appeal (J.S. App. 79a-106a) is reported at 650 F.2d 1104, amended, 665 F.2d 1390, cert. denied, 459 U.S. 916. The original opinion of the district court is reported at 469 F. Supp. 154.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1987, and the notice of appeal to this Court was filed on July 24, 1987 (J.S. App. 107a-109a). The jurisdic-

tional statement was docketed on August 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATEMENT

1.a. This case concerns the application of the Montana severance and gross proceeds taxes to the mining of coal that is held by the United States in trust for the Crow Tribe of Indians. The Crow Reservation was formally established by the Second Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649, which set apart the reserved lands "for the absolute and undisturbed use and occupation" of the Indians (art. II, 15 Stat. 650). See *Montana* v. *United States,* 450 U.S. 544, 547-548 (1981). In the Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352 (J.S. App. 136a-157a), Congress approved an agreement under which the Tribe ceded to the United States an area of approximately 1,137,500 acres, now called the "ceded strip."[1] The 1904 Act obligated the United States to continue to hold the land on the ceded strip in trust for the Tribe pending disposition to non-Indians under various public land laws, and it provided for the Tribe to receive the proceeds of that disposition as they were realized. Art. II, 33 Stat. 357 (J.S. App. 146a-147a); *Ash Sheep Co.* v. *United States,* 252 U.S. 159, 163-166 (1920). The various provisions of the 1904 Act were "all intended to secure to the Indians the fullest possible value for what are referred to in the agreement as 'their lands' and to make use of the proceeds for their benefit" (*Ash Sheep,* 252 U.S. at 165).

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[1] The Reservation previously had been reduced in size by several other statutes. Act of Apr. 11, 1882, ch. 74, 22 Stat. 42; Act of July 10, 1882, ch. 284, 22 Stat. 157; Indian Appropriations Act of Mar. 3, 1891, ch. 543, § 31, 26 Stat. 1039-1040. See *Montana*, 450 U.S. at 548.

On much of the ceded strip, both the surface and the underlying mineral estate were conveyed to entrymen under the homestead laws, to Montana for school lands, or to individual Indians as allotments. In the case of approximately 70,000 acres, however, when patents were issued to non-Indians, the coal deposits were reserved to the United States to be disposed of under the coal-land laws, with the proceeds paid to the Tribe. See J.S. App. 27a; Act of Feb. 27, 1917, ch. 133, §§ 1-4, 39 Stat. 944-945 (codified at 30 U.S.C. 86-89) (J.S. 158a-160a). Mineral rights likewise were reserved to the Tribe in connection with certain allotments to Indians. See Act of May 19, 1926, ch. 338, 44 Stat. 566 (J.S. App. 164a). Tribally owned coal also underlies the Reservation proper.[2]

b. In Section 3 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 463, Congress authorized the Secretary of the Interior to restore to tribal ownership the remaining surplus lands of any Indian reservation that had been opened to entry prior to 1934. Immediately thereafter, the Secretary temporarily withdrew all remaining surplus lands, pending restoration to the tribes concerned. *Restoration of Lands Formerly Indian to Tribal Ownership*, 54 Interior Dec. 559 (1934). That withdrawal order applied to both surface lands and mineral rights (*id.* at 563), and it expressly included Crow Reservation lands that were opened under the 1904 Act (id. at 561). Ultimately, however, the surplus lands and reserved

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[2] Although allotments were made on the Reservation under the Crow Allotment Act of 1920, the mineral rights in allotted lands were reserved to the Tribe for 50 years. See Act of June 4, 1920, ch. 224, §§ 1 and 6, 41 Stat. 751, 753 (J.S. App. 161a-163a), as amended; Act of May 26, 1926, ch. 403, 44 Stat. 658 (J.S. App. 165a-168a), and Act of May 2, 1928, ch. 481, 45 Stat. 482 (J.S. App. 169a). In 1968, Congress permanently vested title to these mineral rights in the Tribe. Act of May 17, 1968, Pub. L. No. 90-308, 82 Stat. 123 (J.S. App. 183a). Compare *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649 (1976).

mineral rights on the ceded strip were not restored to full tribal ownership pursuant to Section 3 of IRA, because the Crow Tribe voted not to accept the provisions of the IRA. Accordingly, by Section 1 of the Act of May 19, 1958 (1958 Act), Pub. L. No. 85-420, 72 Stat. 121 (J.S. App. 176a), Congress separately restored surplus lands to the Crow Tribe and certain other non-IRA tribes. Approximately 10,000 acres of surface lands were restored to the Tribe by the 1958 Act. At that time, the United States also held approximately 150,000 acres of severed mineral rights in the ceded strip in trust for the Tribe, and the Department of the Interior has consistently interpreted the 1958 Act to have restored those rights to full tribal ownership as well. J.S. App. 29a-32a. Section 2 of the 1958 Act in turn provided that lands restored to tribal ownership "shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes." 72 Stat. 121 (J.S. App. 176a).

c. In 1972, Westmoreland Resources, Inc., a non-Indian company, entered into a lease with the Crow Tribe to mine the coal underlying approximately 15,000 acres of the ceded strip in Big Horn County, Montana.[3] That lease was entered into pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.*, which, with certain exceptions not relevant here, governs the mineral leasing of *all* tribally owned lands (see *Montana* v. *Blackfeet Tribe,* 471 U.S. 759, 763 (1985)), both on and off-reservation. § 1, 25 U.S.C. 396a (J.S. App. 172a).[4]

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[3] Another lease entered into in the same year, covering an additional 16,000 acres, was cancelled in 1982 by the consent of the Tribe, Westmoreland, and the Secretary (J.S. App. 32a).

[4] The Crow Reservation, like several others, was originally excluded from the 1938 Act. § 6, 25 U.S.C. 396f (J.S. App. 174a). However, in 1959, the 1938 Act was made applicable to the leasing of reserved

Westmoreland has long-term contracts, extending through the year 1993, to supply coal from that tract to four midwestern utility companies. In 1980, the Shell Oil Company entered into an agreement to mine an area within the Crow Reservation. At the time of trial, however, Shell had not begun operations under the agreement because it could not find a purchaser for the coal, and Shell surrendered its rights under the agreement in 1985. J.S. App. 6a, 32a-33a.

2. In 1975, Montana enacted two taxes on coal production: a gross proceeds tax, levied at a rate equal to the county property tax (Mont. Code Ann. §§ 15-23-701 *et seq.* (1986) (J.S. App. 206a-207a)), and a severance tax, levied at a rate of between 3% and 30% of the contract price f.o.b. mine (Mont. Code Ann. §§ 15-35-101 *et seq.* (1986) (J.S. App. 208a-226a); see *Commonwealth Edison Co.* v. *Montana,* 453 U.S. 609, 613 (1981)).[5] The 30% severance tax rate for the coal at issue here was based on the Montana Legislature's finding that such coal—

> is in sufficient demand that at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes * * *.

Mont. Code Ann. § 15-35-101(e) (J.S. App. 208a). The combined effective rate of Montana's severance and gross proceeds taxes is the highest in the United States. Cf. *Commonwealth Edison,* 453 U.S. at 640 (Blackmun, J., dissenting).[6]

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minerals underlying Reservation land that is subject to allotment. See Act of Sept. 16, 1959, Pub. L. No. 86-283, 73 Stat. 565 (J.S. App. 181a).

[5] Montana also imposes a resource indemnity trust tax of 0.5% of the value of all minerals mined in the State. The proceeds of that tax are placed in a trust account to be used "to improve the total environment and rectify damage thereto." Mont. Code Ann. §§ 15-38-104, 15-38-203. Neither the Tribe nor the United States has challenged application of that tax to the Tribe's coal.

[6] The combined effective rate (after allowed deductions) of these taxes on surface mining of the Crow Tribe's coal was estimated by the

The revenues from the severance tax are allocated by statute as follows: 50% is paid into a Permanent Trust Fund, the principal of which may be appropriated only by a three-fourths vote of the Legislature and the income from which may be appropriated annually for general state expenditures (Mont. Code Ann § 15-35-108(1) (J.S. App. 216a); Mont. Code Ann. § 17-6-203(5); see *Commonwealth Edison,* 453 U.S. at 613); other revenues are paid into the general fund and into special funds for public schools, conservation districts, water development projects, libraries, and acquisition of art works. Mont. Code Ann. § 15-35-108(3) (J.S. App. 217a-218a)). The severance tax statute also established three funds that were to be used for coal-related expenses: the coal area highway reconstruction fund, the coal impact fund, and the coal counties fund. However, those funds were initially allocated only 31% of the severance tax revenues, and, as of 1981, they received only 8.75% of those revenues. J.S. App. 16a. The gross proceeds tax is collected by the county and is used to meet general county and school district expenses (*id.* at 49a).

Tribe's expert witness to be 32.9% – more than twice that of Wyoming, the State with the next highest coal taxes. Montana, using a different method, calculated the rate at between 21% and 22%. J.S. App. 11a n.2.

In apparent recognition of the impact of the severance tax on coal production, the Montana Legislature in 1987 reduced the tax for coal of the quality at issue here to 25% for fiscal year 1990 and 20% for 1991 and subsequent years; and if statewide production exceeds 32.2 million tons (the average production for the years 1983-1986), the tax rate will be reduced to 25% from July 1, 1988, to June 30, 1990; to 20% from July 1, 1990, to June 30, 1991; and to 15% thereafter. 1987 Mont. Laws 1564, amending Mont. Code Ann. § 15-35-103 (J.S. App. 232a-235a). The 1987 amendments also provided for certain tax credits for new coal production (*id.*, amending Mont. Code Ann. § 15-35-202 (J.S. App. 237a-238a)). See J.S. 7-8 n.5. These amendments were not in effect when this case was decided.

Between 1975 and 1982, Westmoreland paid $53,800,000 in severance taxes and $8,100,000 in gross proceeds taxes as a result of its mining operations on the ceded strip. And since January 1983, Westmoreland has paid an additional $20,000,000 in taxes into the registry of the district court, pending the outcome of this case (J.S. App. 5a-6a). By contrast, through October 1983, Westmoreland had paid only $17,877,126 in royalties to the Tribe (*id.* at 56a). Moreover, the Tribe thus far has received no tax revenues from the mining of the coal. The Tribe did enact a 25% severance tax in 1976, and that tax was approved by the Secretary for application to mining on the Crow Reservation, such as that once planned by Shell. The Secretary disapproved application of the tribal tax to tribal coal mined from the ceded strip, because the Crow Tribe's Constitution disclaimed jurisdiction in that area. Nevertheless, in a 1982 amendment to its lease, approved by the Secretary, Westmoreland agreed to pay the tribal tax, subject to a credit for all state severance and gross proceeds taxes it was required to pay. Because of the higher taxes imposed by the State, this offset has prevented the Tribe from receiving any tax revenues. *Id.* at 6a, 53a-55a.

3.a. This suit was brought by the Crow Tribe in 1978 against the State of Montana, the Counties of Big Horn, Yellowstone, and Treasure, and various state and county officials. The Tribe sought declaratory and injunctive relief barring imposition of the Montana coal severance tax and gross proceeds tax on the production of tribally owned coal underlying the Reservation proper and the ceded strip. The district court dismissed the complaint for failure to state a claim. *Crow Tribe of Indians* v. *Montana,* 469 F. Supp. 154 (D. Mont. 1979).

b. In an opinion dated July 13, 1981 (J.S. App. 79a-106a), the court of appeals reversed and remanded for the district court to determine whether imposition of the

Montana taxes on the mining of the Tribe's coal impermissibly thwarts the goal of the Indian Mineral Leasing Act of 1938 to promote tribal self-government and economic development. The court found it significant that the background of the severance tax reflected two purposes that would conflict with the 1938 Act: to capture for the State a portion of the economic value of the coal and to regulate the manner in which coal is mined (J.S. App. 94a-97a). In the court's view, state taxes having such effects could be applied to the Tribe's coal only if Montana established that it had legitimate interests in taxing the coal and that the taxes were carefully tailored to effectuate those interests (*id.* at 97a-99a). The court of appeals also directed the district court to determine whether the taxes impermissibly interfere with tribal sovereignty, because they may affect the Tribe's ability to raise money for essential tribal services and because they are derived from "a component of the reservation land itself" (*id.* at 103a; see generally *id.* at 99a-104a).[7]

4. On remand, the district court once again sustained the Montana taxes as applied to the mining of the Tribe's coal in the ceded strip, although it declined to rule on the validity of the taxes as applied to on-Reservation coal because that coal was not being mined (J.S. App. 22a-74a).[8] The court first held that the Tribe retained a beneficial interest in the mineral interests in the ceded strip after the area was opened to settlement under the 1904 Act and that the 1958 Act restored those interests to full tribal ownership (J.S. App. 27a-32a, 60a-62a). But although Section 2 of the 1958 Act provides that lands

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[7] This Court denied the State's petition for a writ of certiorari to review the court of appeals' decision. 459 U.S. 916 (1982).

[8] In the proceedings on remand, the United States, which previously had appeared as amicus curiae, intervened as a plaintiff in support of the Tribe.

restored to tribal ownership are also made part of the existing reservation of the tribe concerned (see page 4, *supra*), the court concluded that the Tribe's mineral interests in the ceded strip were not restored to the Crow Reservation by the 1958 Act (J.S. App. 62a-63a).

The district court also recognized that there was no express congressional authorization for imposition of state taxes on the mining of the Tribe's coal, since this Court had held in *Montana* v. *Blackfeet Tribe*,471 U.S. 759 (1985), that the Indian Mineral Leasing Act of 1938 did not carry forward the taxing authorization that was contained in the Act of May 29, 1924, ch. 25 U.S.C. 398 (1924 Act). J.S. App. 63a. But the court nevertheless held that Montana's severance and gross proceeds taxes are valid because they do not conflict with the 1938 Act's purposes of revitalizing tribal governments and promoting economic development; in the court's view, the state taxes neither deprive the Tribe of control over its coal nor "significantly" affect the rate of coal development (*id.* at 66a-68a). The court further held that even if the taxes do hinder tribal economic development to some extent, that result was justified because the tax "perpetuate[s] the mineral wealth subject to [the State's] general civil jurisdiction" and provides for "such unquantifiable interests as the value of a trained workforce, an organized government and system of laws, as well as the unquantifiable burden of future socio-economic and environmental impacts resulting from coal mining" (*id.* at 67a-68a).[9]

5. A unananimous panel of the court of appeals reversed, holding that the Montana taxes, in their current form, cannot be applied to the mining of the Tribe's coal (J.S. App. 1a-21a). The court first held that the district

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[9] The court also held that the severance and gross proceeds taxes do not infringe on tribal sovereignty, because the Tribe does not exercise governmental power over the ceded strip or provide services there (J.S. App. 68a-71a).

court had erred in attaching virtually dispositive significance to its belief that the minerals underlying the ceded strip are technically outside the Reservation. The court explained that its holding on the prior appeal that the coal is a "component of the reservation land itself" (*id.* at 7a (quoting *id.* at 103a)) was the law of the case, and that in any event, Section 2 of the 1958 Act "restored to reservation status all lands returned to tribal ownership under [that] Act" (J.S. App. 7a).

The court of appeals next held that application of the severance and gross proceeds taxes to coal mined on the Reservation proper and on the ceded strip conflicts with the 1938 Act's purposes of promoting tribal self-government and economic development (J.S. App. 9a-17a). The court concluded that the high tax rates interfere with the Tribe's economic interests by reducing the coal's marketability[10] and by reducing the royalty the Tribe's lessees otherwise would be in a position to pay (*id.* at 11a-13a). This case therefore was found to be different from *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), where the Court held that the tribes were merely marketing an exemption from the state cigarette tax, because here the Tribe is marketing its own property and the lease generates value by virtue of tribal activities in which the Tribe has a substantial interest (J.S. App. 10a). In these respects, the court reasoned, the Tribe's coal-leasing enterprise is similar to the Indian-run bingo games that were held not to be subject to state regulation in *California* v. *Cabazon*

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[10] The court found that Montana had failed to rebut the evidence presented by the Tribe that in each year since the coal taxes were imposed, Montana's previously booming coal production had declined, while coal production in the adjoining State of Wyoming (where coal taxes are lower) continued to grow (J.S. App. 11a, 12a). In the court's view, this "[exact] correspond[ence]" showed at least some negative impact on the highly taxed coal's marketability (*id.* at 12a).

Band of Mission Indians, No. 85-1708 (Feb. 25, 1987). J.S. App. 10a, 15a.

The court of appeals also rejected Montana's contention that countervailing state interests justify the taxes' interference with the purpose of the 1938 Act (J.S. App. 13a-17a). The court noted that under the preemption analysis of *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136 (1980), and *Cabazon,* "the question is one of reviewing the state, federal, and tribal interests involved and whether, in this context, the state action is contrary to federal action" (J.S. App. 14a). Here, the court concluded that (i) Montana had failed to demonstrate legitimate state interests of a sufficient magnitude to overcome the strong presumption against the application of state taxes to activities that are essential to tribal self-government and economic development, and (ii) Montana's taxes are in any event not narrowly tailored to serve the State's asserted interests (J.S. App. 15a-17a). The record showed, for example, that although population growth attributable to increased mining between 1970 and 1982 had resulted in $38 million in governmental expenditures, state and local taxes (other than the coal taxes) had generated $42 million in additional revenues (*id.* at 15a-16a). And although the court recognized that there might be additional costs associated with the environmental consequences of coal mining, it found that "the state [had] failed to provide a specific figure" and instead proposed to "charge a heavy tax for indeterminable future costs, imposing on the Tribe the burden of the doubt" (*id.* at 16a). Moreover, many of the environmental impacts relied upon by the State were already addressed by federal and state regulation of mining activity under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, and air and water pollution laws (J.S. App. 16a). For these reasons, and because the majority of the revenues from Montana's severance taxes were dedicated to other purposes, the court of

appeals found only a "distant, rather than carefully tailored, relationship between severance tax revenues and the coal-related services" (*id.* at 16a-17a).[11]

ARGUMENT

The court of appeals correctly concluded that both Montana's 30% severance tax and its gross proceeds tax are preempted by the Indian Mineral Leasing Act of 1938 insofar as Montana seeks to apply those taxes to the mining of coal held in trust by the United States for the benefit of the Crow Tribe. Those state taxes directly interfere with one of the principal purposes of the 1938 Act: "to ensure that Indians receive 'the greatest return from their property.' " *Montana* v. *Blackfeet Tribe,* 471 U.S. 759, 767 n.5 (1985) (citations omitted). Moreover, under the balancing approach mandated by *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136 (1980), and *California* v. *Cabazon Band of Mission Indians,* No. 85-1708 (Feb. 25, 1987), Montana has wholly failed to carry its burden of showing that imposition of its extraordinarily high taxes on the mining of coal held by the United States in trust for the Tribe could be justified by state expenditures or other state interests that have a direct relation to the mining of the Tribe's coal or to other tribal activities or benefits.

Because Montana has sought to impose its severance and gross proceeds taxes in full force to the mining of tribally owned coal, without tailoring their application to take account of countervailing federal and tribal interests, those taxes necessarily are preempted. The court of

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[11] The court of appeals also held that the state taxes impermissibly infringe upon tribal sovereignty because the revenues now realized by the State for its general purposes could support essential tribal services and because the state taxes interfere with the Tribe's control over the development of its own resources (J.S. App. 17a-19a).

appeals' decision so holding rests on the application of settled principles and presents no issue of general importance warranting plenary review by this Court. The judgment of the court of appeals therefore should be affirmed. That course would not foreclose the Montana Legislature from tailoring its taxes in the future to correspond in some measure to legitimate state interests in this setting.

1.a. The coal owned by the Crow Tribe represents a principal component of the economic value of the Crow Reservation that was formally set aside for the Tribe in 1868 by the Second Treaty of Fort Laramie. That coal was expressly retained in reserved status for the benefit of the Tribe when the surface estate in the ceded-strip lands at issue here was allotted to Indians or patented to non-Indians as part of the opening of the ceded strip. Moreover, as Montana concedes (J.S. 10), the district court, based on a thorough review of the relevant materials, expressly held that the coal in the ceded strip—not merely the surplus surface land—was restored to full tribal ownership by Section 1 of the 1958 Act (J.S. App. 5a, 27a-32a, 60a-62a). The court of appeals affirmed that holding (*id.* at 5a), and the State does not appear to challenge it here (see J.S. 10, 17-18).

Thus, Montana seeks to impose its taxes on the extraction of minerals that are unquestionably the property of the Tribe and are held in trust by the United States for the benefit of the Tribe in the same manner as all other trust property. In *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), which involved the same severance tax that is at issue here, the Court observed that "[i]n many respects, a severance tax is like a real property tax" (*id.* at 624). There can be little doubt that Montana is prohibited from imposing a real property tax on any lands, including coal deposits, that are held by the United States in trust for the Tribe, and the disclaimer clause in the Enabling Act by which Montana was admitted to the Union clearly bars

such a tax. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 677. These circumstances alone suggest that application of Montana's taxes to the mining of the Crow Tribe's coal raises a grave potential for interference with important economic and other interests of the Tribe and the United States.

This conclusion is reinforced by the fact that the coal reserved for the Tribe is a depletable resource and the mining of that coal has the effect of diminishing the scope and value of the reservation itself. Thus, state taxes on the extraction of a depletable resource have the effect of diverting to the State a portion of the value of the reservation itself.[12] The Tribe has a vital interest in realizing the maximum return from the coal as it is extracted, so that the proceeds may be invested in a manner that will generate income or provide essential services for the Tribe and its members after the coal itself is gone. By contrast, Montana does not have a substantial interest in capturing a portion of the value of the Tribe's coal in order to devote that portion to *state* purposes.

2. Especially in light of the foregoing considerations, it is clear that application of Montana's current severance and gross proceeds taxes to the mining of the Tribe's coal is preempted by the Indian Mineral Leasing Act of 1938.

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[12] A comparable situation was presented in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), in which the Court held that the income an allottee realized from the sale of timber was not subject to federal taxation. The Court explained that the Indian's "timber constitutes the major value of his alloted land" and that "[o]nce logged off, the land is of little value." The Court therefore concluded that the allotment would not serve the congressional purposes of bringing the Indian to a state of competency and independence unless the entire proceeds of the sale of its timber were preserved for him. 351 U.S. at 10. See also *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. at 138 (cutting of timber on tribal land generated 90% of tribe's income for governmental programs).

The text and legislative history of the 1938 Act firmly establish that it does not leave room for state taxes of such magnitude.

a. Shortly before the 1938 Act was passed, this Court sustained the application of Montana's gross production and net proceeds taxes to a non-Indian company that produced oil and gas on lands leased from the Blackfeet Tribe. *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U.S. 159 (1936). However, the Court there observed that it was "conceded that the State is without power to apply either [tax] to the production under this lease, save and except as Congress may have given its assent" (*id.* at 161). The Court accordingly sustained the tax only on the basis of the express assent of Congress contained in the Act of May 29, 1924, 25 U.S.C. 398, which provided that "the production of oil and gas and other minerals on such lands may be taxed by the State in which such lands are located in all respects the same as production on unrestricted lands * * *." 299 U.S. at 164-165, 166. When Congress enacted the 1938 Act less than two years later, it declined to include a similar authorization of state taxes. For this reason, the Court held in *Montana* v. *Blackfeet Tribe* that Montana may not impose its severance and net proceeds taxes on a Tribe's royalty income under oil and gas leases entered into pursuant to the 1938 Act.

b. Similar considerations require the conclusion that Montana's severance and gross proceeds taxes are presumptively invalid as applied to a non-Indian lessee under leases entered into pursuant to the 1938 Act.

First, as noted above, this Court made clear in *British-American* that at the time the 1938 Act was passed, the express authorization in the 1924 Act was required in order for Montana to impose its taxes on a non-Indian producer. Because Members of Congress, like other citizens, are assumed to know the law, Congress's deliberate

omission of a similar authorization of state taxes in the 1938 Act—even though it patterned the 1938 Act after the 1924 Act in other respects—strongly indicates that Congress did not intend to permit a State to tax the non-Indian producer. Cf. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378-382 (1982). By contrast, on federally owned lands that are *not* held in trust for Indians, Congress has expressly consented to the imposition of state taxes on the output of mines and the property of the lessee. 30 U.S.C. 189. In *Commonwealth Edison*, this express authorization was critical to the Court's sustaining of Montana's coal severance tax as applied to mining of federally owned coal. 453 U.S. at 631-633.

Second, as the court of appeals held (J.S. App. 9a-13a), application of Montana's severance and gross proceeds taxes to the mining of the Crow Tribe's coal would be inconsistent with the purpose of the 1938 Act "to ensure that Indians receive 'the greatest return from their property' " (*Montana* v. *Blackfeet Tribe*, 471 U.S. at 767 n.5, quoting S. Rep. 985, 75th Cong., 1st Sess. 2 (1937), and H.R. Rep. 1872, 75th Cong., 3d Sess. 2 (1938)). If a lessee must pay state taxes on the production of minerals from Indian lands, the amount of revenues that the Tribe can receive necessarily is diminished. That effect is especially vivid in this case. The $80 million that the State has realized by application of the two taxes since 1975 far exceeds the royalties received by the Tribe under the lease, which totalled less than $18 million as of October 1983. Moreover, although the Tribe adopted its own 25% severance tax in 1976 and Westmoreland agreed in a 1982 amendment to its lease to pay the tribal tax, the Tribe thus far has been unable to realize any revenues from this arrangement. Under the lease amendment, Westmoreland must receive a credit for taxes paid to the State. See page 7, *supra*. Because the Montana taxes are imposed at a higher rate, the Montana taxes have had the direct effect

since 1982 of preventing the Crow Tribe from receiving an additional 25% of the value of its coal.[13]

Third, the state taxes also conflict with the policy of the 1938 Act to " 'bring all mineral-leasing matters in harmony with the Indian Reorganization Act' " (*Montana* v. *Blackfeet Tribe*, 471 U.S. at 767 n.5 (quoting S. Rep. 985,

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[13] The court of appeals also concluded that the high rate of the Montana taxes had at least some negative impact on the marketability of the Tribe's coal (J.S. App. 11a-13a). The court noted that in 1975, Montana accounted for 40.6% and Wyoming accounted for 43.8% of coal production in the Northern Great Plains; by 1982, Montana's share had dropped to 18.2% and Wyoming's share had risen to 69.5% (*id.* at 11a). The State contends (J.S. 12 n.8, 20-21) that the court of appeals improperly disregarded district court findings that the taxes did not affect the coal's marketability. However, the district court did not find that Montana's taxes had *no* effect on the marketing of the Tribe's coal; it expressly stated that the cumulative effect of those taxes is one factor that affects marketability, although it concluded that the tax rate, "at least at present," was overshadowed by other factors (J.S. App. at 56a). Nor did the court of appeals disregard the district court's findings; it correctly noted that "[t]he district court did not find the impact of taxes to be negligible" (*id.* at 12a).

Moreover, since the district court rendered its decision, Montana has essentially admitted that the severance tax has an impact on the marketability of coal, because the Legislature has established a system of tax credits to provide an incentive for the purchase of "new coal" and has reduced the tax rate at least to 20% by the year 1991. See note 6, *supra*. Similarly, when the severance tax was sustained against a Commerce Clause challenge, the Montana Supreme Court recognized that the tax might have an effect on marketability unless it was at least partially absorbed by producers, "because Montana does not have a monopoly in the production of coal" and "must compete in the market with coal produced in Wyoming, North Dakota, and other sources of supply" (*Commonwealth Edison Co.* v. *State*, 189 Mont. 191, 209, 615 P.2d 847, 856-857 (1980), aff'd, 453 U.S. 609 (1981)).

In any event, in view of the fact (discussed in the text) that the State's taxes have deprived the Tribe of an additional 25% of the value of the coal under *existing* contracts, the invalidity of the state taxes for present purposes does not depend on whether the taxes also have an impact on the ability of the Tribe to market its coal under future contracts.

supra, at 3, and H.R. Rep. 1872, *supra*, at 3)). The proviso to the 1924 Act that permitted state taxation of a lessee's income on production of minerals from unallotted lands was an integral part of the policy of allotting tribal lands to individual Indians and opening surplus lands to non-Indians. However, " '[t]he policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act' " (*Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479 (1976), quoting *Mattz* v. *Arnett*, 412 U.S. 481, 496 n.18 (1973)). In the Indian Reorganization Act (IRA), Congress prohibited any further allotment of reservation lands (§ 1, 25 U.S.C. 461), extended the trust period for existing allotments (§ 2, 25 U.S.C. 462), and provided for the restoration to the tribe of any remaining surplus lands (§ 3, 25 U.S.C. 463). The effect, of course, was to remove any expectation that unallotted and surplus tribal lands were destined to pass into non-Indian hands and state jurisdiction, and thereby to remove the justification for the state to tax mineral production on those lands in the same manner as lands that are subject to the State's jurisdiction. Montana's attempt to impose its taxes on the mining of coal that was restored to full tribal ownership in conformity with the IRA's repudiation of the allotment and surplus-land policies therefore conflicts with the 1938 Act's purpose of furthering the goals of the IRA.

Application of state taxes to leases under the 1938 Act also is inconsistent with the purpose of the IRA (and therefore of the 1938 Act) " 'to rehabilitate the Indian's economic life' " and " 'to give the Indians the control of their own affairs and of their own property.' " *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11125 (1934) (remarks of Sen. Wheeler)). The income that the Tribe realizes from the mineral leasing of its lands, whether by royalty payments or taxes, is an

"essential instrument of self-government and territorial management" (*Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139 (1982)). The ability of the Tribe to obtain those revenues could be seriously impeded if the State were permitted to siphon off a portion of the value of the Tribe's resources.

3. Although state taxes of the magnitude of those at issue here plainly conflict with the Indian Mineral Leasing Act of 1938, the court of appeals did not hold that the State is barred from imposing *any* tax on the mining of coal owned by the Crow Tribe. Rather, the court correctly concluded that the validity of state taxes must be determined by application of the principles applied by this Court in *White Mountain Apache Tribe* v. *Bracker, supra*, and *Cabazon*, which require a "particularized inquiry into the nature of the state, federal, and tribal interests at stake" (*Bracker*, 448 U.S. at 145). See also *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832, 838-839 (1982). Under this approach, " '[s]tate jurisdiction is preempted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.' The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic devlopment." *Cabazon*, slip op. 13 (quoting *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334, 335, (1983)).

Here, as we have explained, the federal and tribal interests reflected in the 1938 Act and the IRA weigh heavily against imposition of Montana's severance and gross proceeds taxes. Indeed, this conclusion follows *a fortiori* from *White Mountain Apache Tribe* v. *Bracker, supra*. There, the Court held that the state's motor carrier license tax and fuel use tax could not be applied to a non-Indian contrac-

tor harvesting tribal timber. The amount of the state taxes assessed over a 4 ½-year period totalled $35,000, which was less than 1% of the White Mountain Apache Tribe's profits from timber harvesting (448 U.S. at 158-159 (Stevens J., dissenting)). Nevertheless, the Court held that even this minor diminution in the revenues received by the Tribe from the exploitation of its natural resources was prohibited, because it "threaten[ed] the overriding federal objective of guaranteeing Indians that they 'will receive * * * the benefit of whatever profit [the forest] is capable of yielding' " (*id.* at 149, quoting 25 C.F.R. 141.3(a)(3) (1979)) and the federal policy of promoting tribal economic development (see 448 U.S. at 143-144 & n.10, 149).[14] It follows that the Montana severance and gross proceeds taxes, imposed at an effective rate of 32.9% (see note 6, *supra*), likewise impermissibly interfere with the federal policy of promoting tribal economic development by ensuring that the Crow Indians receive " 'the greatest return from their property' " (*Montana* v. *Blackfeet Tribe*, 471 U.S. at 767 n.5 (citations omitted)).[15]

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[14] The Secretary's regulations at issue in *Bracker* involved the Bureau of Indian Affairs in all aspects of the contractual relationship between the tribes and the non-Indian timber harvesting companies (448 U.S. at 145-148), just as the leasing of Indian lands for mining purposes is subject to regulation by the Secretary (see 25 C.F.R. Pt. 211; cf. *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 373 (1968)).

[15] Montana attempts (J.S. 20, 23-24) to dismiss the relevance of the impact of the coal taxes on tribal revenues by analogizing the coal taxes to the state cigarette tax that was held to be applicable to on-reservation sales to non-Indians in *Colville*. However, *Colville* did not hold that a state tax's effect on tribal revenues is always irrelevant to preemption analysis. To the contrary, diminishment of tribal revenues as a result of state taxation is a key factor in preemption analysis where, as in *Bracker* and the instant case, Congress has chosen to regulate the tribal activity for the purpose of assuring that the Tribe receives the maximum revenues from that activity. See also *Cabazon*, slip op. 12-15. In *Colville*, by contrast, the Court found that Congress

This Court has indicated that under the balancing approach of *White Mountain Apache Tribe* v. *Bracker* and its progeny, the application of a state tax or other regulatory measure to non-Indians in matters affecting Indians might be justified by functions or services performed by the State in connection with those matters. *Cabazon*, slip op. 17-18; *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 336; *Ramah Navajo*, 458 U.S. at 843-845 & n.7; *Bracker*, 448 U.S. at 150. But in the area of taxes, the State "must point to more than its general interest in raising revenues" (*New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 336; accord, *Ramah Navajo*, 458 U.S. at 839, 845; *Bracker*, 448 U.S. at 150). That is essentially all the State has done in this case, however, because as this Court and the Montana Supreme Court both held when the Montana severance tax was sustained against a Commerce Clause challenge, the severance tax is " 'imposed for the general support of the [state] government,' " and therefore is a "general revenue tax" (*Commonwealth Edison*, 453 U.S. at 621 (quoting 615 P.2d at 856)). The only state expenditure uniquely associated with Westmoreland's mine that has been identified in the record in this case was the contribution of $500,000 to pay 25% of the cost of constructing a road used by employees and suppliers of the mine (the federal government paid the other 75% of the cost). See Exh. 42, at II-25 to II-26; 3 Tr. 417. The State therefore has wholly failed to carry its burden of identifying "specific, legitimate regulatory interests" (*Ramah Navajo*, 458 U.S. at 843) that justify collection of more than $80 million in state taxes on the extraction of the Tribe's coal.

For these reasons, the court of appeals was clearly correct in concluding that the state taxes are not "carefully tailored" to meet legitimate state interests in the extraction

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had not sought to regulate on-reservation cigarette sales to nonmembers and had manifested no intent that the tribe obtain revenues from such sales (447 U.S. at 155-156).

of the Tribe's depletable resource (J.S. App. 15a-17a). As the court of appeals found, that mining generates other taxes that meet much of the State's increased expenditures, and the State's concerns for the potential environmental effects of the mining are separately addressed by the Surface Mining Control and Reclamation Act and pollution laws (J.S. App. 16a). Moreover, coal-related purposes received only 8.75% of the severance tax revenues as of 1981 (*ibid.*), and, as noted above, there was no showing that a significant portion of even that limited share of severance tax revenues was expended on matters affecting either the Tribe or Westmoreland's mining. Indeed, the State has essentially conceded that the severance and gross proceeds taxes are not carefully tailored in the manner that this Court's decisions require, because the State acknowledges that they "are general revenue measures, not fees for services rendered," and that they "are designed to fund a broad range of present and future governmental activities," only some of which "hav[e] particular applicability to Westmoreland's mine" (J.S. 21 n.15).

4. Finally, the State seeks to avoid preemption of its severance and gross proceeds taxes as applied to Westmoreland's mining of the Tribe's coal by contending that the coal on the ceded strip is outside the boundaries of the Crow Reservation. In the State's view, such "off-reservation" taxes are automatically valid under *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), and should in any event be sustained under a more relaxed version of the balancing test applied in *Bracker* and *Cabazon*. This contention is without merit for several reasons.

a. Both courts below held—on the basis of the district court's exhaustive review of the background, legislative history, and consistent administrative interpretation of the 1958 Act—that the mineral interests in the ceded strip were restored to full tribal ownership by Section 1 of the 1958 Act (J.S. App. 5a, 27a-32a, 60a-62a). As the court of ap-

peals further held (*id.* at 7a), under Section 2 of the 1958 Act, all lands that were restored to tribal ownership by Section 1 were "made a part of the existing reservations for such tribe or tribes" (72 Stat. 121)—in this case, the Crow Reservation.[16] Contrary to the State's contention (J.S. 17 n.12), this interpretation of the 1958 Act is not contradicted by the language in the committee reports stating that in the case of the Crow Tribe, the restored lands were outside the boundaries of the diminished reservation. See S. Rep. 1508, 85th Cong., 2d Sess. 3 (1958); H.R. Rep. 1336, 85th Cong., 2d Sess. 3 (1958). Rather, those reports show that Congress, with full knowledge of the relevant circumstances, intended to apply to the Crow Tribe's land

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[16] The 1958 Act provided (72 Stat. 121 (J.S. App. 176a)):

> An Act [t]o provide for the restoration to tribal ownership of all vacant and undisposed-of ceded lands on certain Indian reservations, and for other purposes.
>
> * * * * *
>
> [§ 1.] All lands now or hereafter classified as vacant and undisposed-of ceded lands (including townsite lots) on the following named Indian reservations are hereby restored to tribal ownership, subject to valid existing rights:
>
> | Reservation and State | Approximate Acreage |
> |---|---|
> | * * * * * | |
> | Crow, Montana | 10,260.95 |
> | * * * * * | |
>
> Sec. 2. Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes.

The Act's reference to approximately 10,260 acres in connection with the Crow Reservation described only the surface estate, without limiting the operation of the Act to mineral interests underlying other surface lands that previously had been allotted or patented. See J.S. App. 61a-62a.

in the ceded strip the provision in Section 2 of the 1958 Act that made such lands "a part of the existing reservation[ ]."

The State also contends (J.S. 17) that the court of appeals' conclusion that the 1958 Act restored ceded-strip minerals to reservation status is inconsistent with its conclusion that the Act did not give the Tribe jurisdiction over the surface of the ceded area (see J.S. App. 7a n.1). However, neither the United States nor the Tribe has contended that the reservation status of the ceded-strip minerals operated to expand the exterior boundaries of the Crow Reservation on the surface or to confer civil or criminal jurisdiction on the Tribe as a general matter. The restoration of the minerals to reservation status is relevant in this case because it underscores that this valuable tribal asset continues to be held for the benefit of the Tribe and that the usual protection of a tribe's natural resources from state taxation applies equally to the Crow Tribe's coal underlying the ceded strip.

b. In any event, the court of appeals' interpretation of the 1958 Act in the unique circumstances of mineral rights underlying the ceded strip of the Crow Reservation presents no question warranting this Court's attention, since that interpretation is not essential to the judgment below. The court of appeals further held that the Indian Mineral Leasing Act of 1938 applies to tribally owned minerals "irrespective of the location of the tribal coal on or off the reservation" (J.S. App. 8a),[17] and application of the State's taxes to coal on the ceded strip therefore is preempted by the 1938 Act whether or not the coal is technically regarded as part of the Crow Reservation (see

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[17] The 1938 Act applies to mineral leasing both of "unallotted lands within any Indian reservation" and of other "lands owned by any tribe * * * of Indians under Federal jurisdiction" (§ 1, 25 U.S.C. 396a).

id. at 8a-17a). In fact, the conclusion that the 1938 Act has a preemptive force on tribal trust lands outside the boundaries of a reservation as well as within is required by a further purpose of the 1938 Act that was recognized by this Court in *Montana* v. *Blackfeet Tribe*: "to achieve 'uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes' " (471 U.S. at 767 n.5 (quoting S. Rep. 985, *supra,* at 2, and H.R. Rep. 1872, *supra,* at 1)). Similarly, the purpose of the 1938 Act of ensuring that Indians receive "the greatest return from their property" (see pages 16-17, *supra*) applies with equal force to reserved mineral rights that happen to lie outside the boundaries of the tribe's reservation for other purposes. That is especially so with respect to the Crow Tribe's mineral rights underlying the ceded strip, because those rights are part of the original Crow Reservation and because this Court long ago held that the 1904 Act was intended to secure for the Tribe the "fullest possible value" for the ceded-strip portion of its Reservation lands. (*Ash Sheep,* 252 U.S. at 165).

c. Contrary to the State's contention (J.S. 15-16, 23), the court of appeals' decision in this case is fully consistent with *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973), even if the court of appeals erred in holding that the Tribe's mineral interests in the ceded strip are part of the Crow Reservation. In *Jones,* the Court upheld the application of a state income tax to revenue generated by the tribe's operation of a ski lodge on leased land that was held by the United States in trust for the tribe. But the income being taxed was not, as here, directly tied to the depletion of the value of the trust land itself. In fact, although the Court sustained the state income tax as applied to revenues derived from the ski resort, it invalidated the state's compensating use tax as applied to materials used in the construction of ski lifts on the land. The Court held that permanent fixtures on the land are so intimately bound up with the use of the land itself that they too must be exempt from state taxation. 411 U.S. at 158-159. In this case, a tax

on the extraction of tribally owned minerals likewise is effectively a tax on the trust land itself. Thus, the decision in *Jones* did not purport to announce a per se rule approving all state taxation of off-reservation activities affecting tribal interests, and it certainly does not justify state taxation of the extraction of tribal mineral resources that were part of the Crow Tribe's original reservation and have continued at all times to be reserved for its benefit.[18]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[18] The State also contends (J.S. 24-25) that the court of appeals erred in invalidating the state taxes as applied to mining on the Crow Reservation proper (J.S. App. 19a-20a). Whether an issue is ripe for review turns on " 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' " *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (quoting *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967)). Here, the court of appeals correctly concluded that the potential impact of the state taxes on the Tribe's ability to market its coal justified a determination regarding the application of the state taxes to on-reservation mining. Moreover, the legal issue was manifestly fit for judicial resolution: if, as we have shown, the court correctly concluded that the taxes are preempted as applied to mining on the ceded strip, it follows *a fortiori* that they are preempted within the boundaries of the Reservation.

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